Ambank (M) Bhd v Razshah Enterprise Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02(F)-6 OF 2009(A)
AUGUSTINE PAUL, ZULKEFLI AND MOHD GHAZALI FCJJ
12 JANUARY 2010

Civil Procedure — Appeal — Appeal to Federal Court — Framing of questions — Framing of questions for determination by Federal Court, nature and manner of — Circumstances when Federal Court may refuse to answer questions — Courts of Judicature Act 1964 s 96(a)

Civil Procedure — Appeal — Appeal to Federal Court — Whether would clarify or refine principles involved — Whether conflicting decisions of Court of Appeal over points in issue — Whether leave to appeal ought to be given

The plaintiff granted the borrower a loan facility ('the loan') secured through a legal charge over the defendant's lands. The plaintiff sued the defendant to recover outstanding installments owed by the borrower and to enforce the charge. The defendant counterclaimed against the plaintiff. Its counterclaim was based on two letters issued by the plaintiff to the borrower. The plaintiff applied to strike out the defendant's counterclaim on the basis that the two letters did not concern the defendant and the defendant, not being a party to the loan agreement between the plaintiff and the borrower, had no locus standi to file the counterclaim. The High Court allowed the application. On the defendant's appeal to the Court of Appeal, the Court of Appeal held that the loan agreement was in the nature of a contract of guarantee in which the defendant was a party. The defendant therefore had the locus standi to commence the counterclaim against the plaintiff, held the Court of Appeal. The plaintiff appealed to the Federal Court. The sole question posed for determination concerned, inter alia, whether a person who was not a party to an agreement between two others, could bring an action against one of the parties to the agreement in respect of a breach of the agreement.

Held, dismissing the appeal with costs:

(1) Questions for the Federal Court's determination under s 96(a) of the Courts of Judicature Act 1964 ('the Act') must be carefully and properly drafted. If the questions do not have the effect of affecting the outcome of the appeal, the Federal Court may decline to answer them (see paras 3–4); *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621 followed.

(2) The Court of Appeal had arrived at a correct decision in allowing the appeal by defendant against the decision of the High Court. It rightly found that the loan agreement was in the nature of a contract of guarantee taking into consideration the charge document executed by the plaintiff and the defendant. There was a form of tripartite agreement entered into between the parties. Therefore the defendant's right and liability had arisen under the suit filed by the plaintiff and the counterclaim of the defendant (see paras 5 & 7).

(3) In the instant case, the plaintiff had drafted the question on the basis that the defendant was not a party to the agreement entered into between the plaintiff and the borrower. However, the Court of Appeal had allowed the defendant's appeal and found as a fact that the loan agreement was in the nature of a contract of guarantee in which the defendant was a party. The defendant therefore had the locus standi to commence the counterclaim against the plaintiff. The question posed thus had not been properly framed as it did not relate to a matter in respect of which a determination had been made by the Court of Appeal (see para 10).

(4) The Court of Appeal had come to a correct decision upon the application of a well established principle to the facts of the case. A further appeal to the Federal Court would be of no utility. It would do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future. The plaintiff's counsel was also not able to show that there were two conflicting decisions of the Court of Appeal over the point in issue in the instant case. The plaintiff had failed to satisfy the requirement of s 96(a) of the Act and the Federal Court would therefore decline to answer the question posed (see paras 11–12); *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Turstees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257 referred.

(5) The defendant's counterclaim was not an obvious case where summary jurisdiction under O 18 r 19 of the Rules of the High Court 1980 could be invoked. In view of the protracted litigation, the Federal Court would order an early trial and that the case be given hearing priority by the trial court (see para 13).

[Bahasa Malaysia summary

Plaintif telah memberikan peminjam kemudahan pinjaman ('pinjaman tersebut') yang dijamin melalui gadaian sah atas tanah-tanah defendan. Plaintif telah menyaman defendan untuk mendapat balik baki bayaran ansuran yang belum dijelaskan oleh peminjam dan untuk menguatkuasakan gadaian tersebut. Defendan telah menuntut balas terhadap plaintif. Tuntutan balasnya berdasarkan dua surat yang dikeluarkan oleh plaintif kepada

peminjam. Plaintif telah memohon untuk membatalkan tuntutan balas defendan dengan asas bahawa kedua-dua surat itu tiada kaitan dengan defendan dan defendan, yang bukan pihak kepada perjanjian pinjaman antara plaintif dan peminjam, tiada locus standi untuk memfailkan tuntutan balas. Mahkamah Tinggi telah membenarkan permohonan tersebut. Dalam rayuan defendan ke Mahkamah Rayuan, Mahkamah Rayuan memutuskan bahawa perjanjian pinjaman tersebut bersifat sebagai kontrak jaminan yang mana defendan merupakan satu pihak. Oleh itu defendan mempunyai locus standi untuk memulakan tuntutan balas terhadap plaintif, sepertimana diputuskan Mahkamah Rayuan. Plaintif merayu ke Mahkamah Persekutuan. Satu-satunya persoalan yang dikemukakan untuk ditentukan berkaitan, antara lain, sama ada seseorang yang bukan pihak kepada perjanjian antara dua yang lain, boleh memulakan tindakan terhadap salah satu daripada pihak kepada perjanjian berhubung pelanggaran perjanjian tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Persoalan-persoalan untuk penentuan Mahkamah Persekutuan di bawah s 96(a) Akta Mahkamah Kehakiman 1964 ('Akta tersebut') perlu digubal dengan berhati-hati dan sewajarnya. Jika persoalan-persoalan itu tidak mempunyai kesan menjejaskan keputusan rayuan, Mahkamah Persekutuan boleh tidak menjawab persoalan-persoalan tersebut (lihat perenggan 3–4); *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621 diikut.

(2) Mahkamah Rayuan telah membuat keputusan tepat membenarkan rayuan defendan terhadap keputusan Mahkamah Tinggi. Ianya keputusan yang betul bahawa perjanjian pinjaman tersebut bersifat sebagai kontrak jaminan dengan mengambilkira dokumen gadaian yang disempurnakan oleh plaintif dan defendan. Di sini terbentuk perjanjian tiga pihak antara pihak-pihak berikut. Oleh itu hak dan liabiliti defendan wujud di bawah guaman yang difailkan oleh plaintif dan tuntutan balas defendan (lihat perenggan 5 & 7).

(3) Dalam kes ini, plaintif telah membuat draf soalan berdasarkan defendan bukan pihak kepada perjanjian antara plaintif dan peminjam. Walau bagaimanapun, Mahkamah Rayuan telah membenarkan rayuan defendan dan memutuskan pada hakikatnya perjanjian pinjaman tersebut bersifat sebagai kontrak jaminan yang mana defendan merupakan satu pihak. Oleh itu defendan mempunyai locus standi untuk memulakan tuntutan balas terhadap plaintif. Persoalan yang dikemukakan oleh itu tidak dibuat dengan betul kerana ia tiada kaitan dengan perkara yang mana keputusan telah dibuat oleh Mahkamah Rayuan (lihat perenggan 10).

(4) Mahkamah Rayuan telah membuat keputusan tepat dengan menggunakan prinsip-prinsip tetap terhadap fakta kes. Rayuan

selanjutnya ke Mahkamah Persekutuan adalah sia-sia. Ia tidak menjelaskan atau memperincikan prinsip tersebut, agar dapat digunakan dalam keadaan lain pada masa hadapan. Peguam plaintif juga tidak dapat menunjukkan bahawa terdapat dua keputusan Mahkamah Rayuan yang bertentangan berhubung isu yang dikemukakan dalam kes ini. Plaintif telah gagal untuk memenuhi keperluan s 96(a) Akta tersebut dan Mahkamah Persekutuan dengan itu tidak akan menjawab persoalan yang dikemukakan (lihat perenggan 11–12); *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Turstees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257 dirujuk.

(5) Tuntutan balas defendan bukan kes yang nyata di mana bidang kuasa terus di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 boleh digunakan. Dengan mengambilkira litigasi yang telah dimulakan, Mahkamah Persekutuan akan memerintahkan perbicaraan awal dan agar kes tersebut diberikan keutamaan untuk didengar di mahkamah perbicaraan (lihat perenggan 13).]

Notes

For cases on appeal to Federal Court, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 749–756.

Cases referred to

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Turstees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257, FC (refd)

Joceline Tan Poh Choo & Ors v V Muthusamy [2008] 6 MLJ 621, FC (folld)

Jowitt v Callaghan (1938) 38 SR (NSW) 512 (refd)

Legislation referred to

Contracts Act 1950 ss 79, 80

Courts of Judicature Act 1964 s 96(a)

National Land Code Forms 16A, 16D

Rules of the High Court 1980 O 18 r 19, O 28 r 8(1)

Appeal from: Civil Appeal No A-02–1335 of 2005 (Court of Appeal, Putrajaya)

Porres Royan (Shook Lin & Bok) for the appellant.

Raam Kumar (KB Tan and Noorehan bt Zakaria with him) (TY Tan, Rehan & Partners) for the respondent.

Zulkefli FCJ (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the Court of

Appeal in allowing the appeal of the respondent against the decision of the High Court at Ipoh. The appellant was the plaintiff and the respondent was the defendant before the High Court. We shall refer the parties in this appeal as they were in the High Court. This case had a chequered history and this can be seen from the background facts of the case as follows:

(a) By way of a loan agreement dated 6 July 1983, the plaintiff agreed to grant a term loan of RM2.4m to Wan Mokhar bin Wan Endut ('the borrower') upon the terms and conditions stipulated therein.

(b) On 16 June 1983, the defendant as a guarantor executed a first legal charge over its land comprising of 53 pieces of land held under qualified titled deeds HS(D) 6975/81 to 7027/81 — all in the Mukim of Hulu Kinta, Perak ('the said lands') to secure repayment of the loan and interest thereon together with all other sums and moneys that may become payable by the borrower under the said charge.

(c) Under the terms of the said loan the borrower was to service the monthly interest payments and was required to repay the principal in one lump sum within two years from the date of the drawdown — and that would be by 8 July 1985.

(d) The borrower had defaulted in payment and was indebted to the plaintiff in a sum in excess of RM2.7m as principal and interest on or about 8 July 1985.

(e) By letter dated 7 October 1985, the plaintiff agreed to restructure the repayment of the principal sum upon the request of the borrower. The revised terms were subject to the borrower updating all the interests outstanding.

(f) The borrower did not comply with the obligations as contained in the plaintiff's letter to him dated 7 October 1985. With this non-compliance, the arrangement contained in the letter lapsed and it became unenforceable.

(g) By letter dated 12 May 1986 addressed to the borrower and the defendant, the plaintiff through its then solicitors demanded payment of the balance outstanding sum unpaid to the plaintiff and that came to RM3,215,129.18 calculated as at 18 March 1986.

(h) The borrower requested to extend the repayment due date of the principal outstanding and the plaintiff by letter dated 10 July 1987 agreed to the borrower's request. The revised terms were expressly subject to the borrower updating all the outstanding interests which came up to RM219,734.39 based on the principal outstanding sum of RM1,169,734.39.

(i) By the same letter dated 10 July 1987, the plaintiff also gave notice to the borrower in regard to the following changes:

(i) that the interest rate ('the prescribed rate') has been reduced from 15%pa on monthly rests to 4.5%pa above the plaintiff's base lending rate with effect from 1 May 1987; and

(ii) that damages on late payment (additional interest) had been reduced from 0.05% per day to 0.0493% with effect from 1 February 1987 and that with effect from 1 July 1987 it would be computed at 3% above the prescribed rate.

(j) The borrower failed to update all the outstanding interests as required by the plaintiff in the plaintiff's letter dated 10 July 1987.

(k) By way of a letter dated 29 April 1988 from the plaintiff's solicitors to the defendant, the plaintiff demanded payment of the sum of RM1,218,629.84 owing by the borrower as at 31 March 1988 together with interest at 14%pa from 1 April 1988.

(l) The defendant failed not only to effect the full payment of the amount outstanding but had also committed a breach of the terms of the said charge.

(m) The said breach continued for a period of more than seven days and this prompted the plaintiff through its solicitors to cause a statutory notice in Form 16D dated 27 May 1988 to be issued against the defendant requiring the latter to remedy the said breach within a further period of seven days from the service thereof, failing which an order for sale would be applied for. On 30 May 1988, the Form 16D notice was served on the defendant.

(n) On 9 July 1988 the plaintiff commenced Originating Summons No 31–653 of 1988 in the High Court at Ipoh ('the charge action') for an order for the sale of the said lands.

(o) On 14 December 1992 the charge action was heard by the late Mohtar Abdullah J (as he then was). The learned judge found that there was a 'cause to the contrary' and that an order for sale should not be granted at that stage of the proceedings. The learned judge also directed, inter alia, that the proceedings to be continued 'as if the cause or matter had been begun by writ' pursuant to O 28 r 8(1) of the Rules of the High Court 1980 ('RHC 1980').

(p) On 16 July 1998, Pajan Singh Gill J (as he then was) ordered, inter alia, that the statement of agreed facts and the statement of the issues in dispute be filed together with the written submissions and that all these must be exchanged between the parties.

(q) On 30 June 1999 Pajan Singh Gill J (as he then was) directed counsel on both sides to address the issue of whether the matter was res judicata and could not be heard any further.

(r) On 29 July 1997, Pajan Singh Gill J (as he then was) held that the doctrine of res judicata applied and he dismissed the plaintiff's application for an order for sale and he too dismissed the defendant's counterclaim.

(s) Aggrieved by the decision that was handed down on 29 July 1997, both parties lodged an appeal.

(t) On 24 September 2003, the Court of Appeal dismissed both the appeals and remitted both the plaintiff's charge action and the defendant's counterclaim to the High Court for case management on 1 December 2003 with ancillary directions for parties to file and serve their respective pleadings.

(u) The plaintiff filed its statement of claim dated 6 October 2003. The defendant filed its statement of defence and counterclaim dated 21 October 2003. The plaintiff then filed its reply and defence to the counterclaim dated 11 November 2003.

(v) By way of summon in chambers dated 17 December 2003 the plaintiff sought to strike out the counterclaim of the defendant under O 18 r 19 of the RHC 1980 and under the inherent jurisdiction of the court.

(w) The senior assistant registrar dismissed the plaintiff's application to strike out the defendant's counterclaim.

(x) On appeal, the High Court allowed the plaintiff's application to strike out the defendant's counterclaim.

(y) On appeal to the Court of Appeal, the defendant's appeal was allowed and the defendant's counterclaim was restored before the High Court.

[2] There is only one question posed for the determination of this court in the appeal as follows:

> Whether a person (or other entity) who is not a party to an agreement or arrangement between two other persons can maintain an action or proceeding against one of the two other persons for a breach of the said agreement or arrangement.

[3] It is necessary for us at the outset to state that question for determination of this court for appeal under s 96(a) of the Courts of Judicature Act 1964 ('the Act') must be carefully and properly drafted. On this point we would refer to the case of *Joceline Tan Poh Choo & Ors v V*

Muthusamy [2008] 6 MLJ 621 wherein Augustine Paul FCJ in delivering the judgment of this court at pp 632–633 stated as follows:

> The next matter for consideration is whether the point if decided in favour of the intending appellant will show that there is a prima facie case for success in the appeal. This would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the affect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment. It is only then that the question of success in the appeal can arise. It must be remembered that the very object of making appeals to this court subject to leave is to prevent frivolous and needless appeals (see *Kredin Sdn Bhd v OCBC Bank (M) Bhd* [1998] 3 MLJ 78). Leave to appeal on a proposed question will therefore not be granted if there is no hope of success (see *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681). This is logical. If the answer to the proposed question is obvious in the sense that it will not be in favour of the intending appellant there will be no basis for a prima facie case for success in the appeal. Where a decision depends on the application of a well-established principle to an individual set of facts, a further appeal to the Federal Court will be of no utility if it will do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future (see *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257). The question posed must relate to a matter in respect of which a determination has been made by the Court of Appeal as otherwise it will be academic (see *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225 and *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513). It follows that a question cannot be based on an assumption that a finding has been made in respect of it when, as a matter of fact, no such finding has been made. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal (see *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517). Needless to say, the parties may by consent reframe or amend the question at the hearing stage of the appeal with the approval of the court as demonstrated in *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469.

[4] We would also state here that if the questions do not have the effect of affecting the outcome of the appeal this court may decline to answer them. In this regard reference may be made again to the case of *Joceline Tan Poh Choo & Ors v V Muthusamy* where this court said at pp 633–634:

> The corollary is that if there is no prospect of success in the appeal the position of the appellant will not be affected and it would be pointless hearing the appeal. In *Sun Life Assurance Co of Canada v Jervis* [1994] 1 All ER 469, Viscount Simon LC said at p 470:

> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.

In *Loknath Padhan v Birendra Kuma Sahu* AIR 1974 SC 505, Bhagwati J said at p 508:

> If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the court to engage itself in deciding it. … It would be clearly futile and meaningless for the court to decide an academic question, the answer to which would not affect the position of one party or the other. The court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the court would properly decline to do so.

> Thus this court has the power to decline to answer questions posed in appropriate instances in spite of the fact that leave to appeal had been granted with the result that the appeal must be dismissed without a consideration of its merits. This is demonstrated by cases such as *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225; *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513; *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257; *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 and *Tan Heng Chew & Ors v Tan Kim Hor & Ors* [2006] 5 MLJ 313.

[5] We shall now have a closer look at the sole question posed and relate the said question to the salient facts of the case and the issues raised before the High Court and the Court of Appeal. This is to ascertain whether the question posed for the determination of this court has been properly framed for the appeal to be heard on its merit. Having heard the submissions of learned counsel for the plaintiff and the defendant, it is our judgment that the Court of Appeal had arrived at a correct decision in allowing the appeal by defendant against the decision of the High Court on the grounds which can be discerned as follows.

[6] It must be stated here the plaintiff in fact had recognised under the loan agreement dated 6 July 1983 entered into between the plaintiff and the borrower that the defendant is the guarantor by virtue of it being a first legal third party chargor for the borrower. On this point useful reference may be made to the provisions in the annexure to the charge document Form 16A of

the National Land Code in this case wherein it is clearly intended that the defendant is a guarantor for being the chargor. The provisions in the annexure also made reference to the loan agreement between plaintiff and the borrower. This annexure was signed by both the officers representing on behalf of the plaintiff and the defendant respectively (see pp 161–179 of the appeal record (Vol 2)).

[7] The plaintiff contended that the two letters dated 7 October 1985 and 10 July 1987 which are the basis of the defendant's counterclaim are in respect of arrangement only between the plaintiff and the borrower which relates to the restructuring of the payment of interests under the loan taken by the borrower. It does not concern the defendant and the defendant being not a party to the loan agreement between the plaintiff and the borrower therefore has no locus standi to file the counterclaim against the plaintiff. However, the Court of Appeal had rightly found as a fact that the loan agreement is in the nature of a contract of guarantee taking into consideration the charge document executed by the plaintiff and the defendant. There is a form of tripartite agreement entered into between the parties. Therefore the defendant's right and liability had arisen under the suit filed by the plaintiff and the counterclaim of the defendant.

[8] The Court of Appeal had adequately dealt with the statutes and case laws in supporting the defendant's position of having entered into a contract of guarantee and being privy to the loan agreement. Sections 79 and 80 of the Contracts Act 1950 were cited by the Court of Appeal in showing that the defendant has the locus standi to file the counterclaim. Section 79 of the Contracts Act 1950 states as follows:

> 79 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor'
>
> A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

And s 80 of the Contracts Act 1950 deals with consideration for a guarantee and it is worded as follows:

> 80 Consideration for guarantee
>
> Anything arise, or any promise made, for the benefit of the principal debtor may be sufficient consideration to the surety for giving the guarantee.

[9] We shall reproduce herein one of the many case authorities cited by the Court of Appeal to support its finding that the loan agreement is in the nature of a contract of guarantee by quoting a passage of what Jordan CJ said in *Jowitt v Callaghan* (1938) 38 SR (NSW) 512 at p 516:

> A contract of guarantee or suretyship is a contract between two persons which is intended by them to secure the performance of the obligation of a third person to one of them. The existence, present or future, of the obligation of a third person, and an intention in the parties to the contract to secure the performance of that obligation, are essential features of a contract of guarantee. If these elements are present, the contract is one of guarantee whether the promise be collateral to the promise of a principal obligor and in the nature of a distinct and separate promise to perform the principal obligation if he does not: *Inland Revenue Commissioners v. Holder* [1931] 2 KB 81 at pp 101–102; [1932] AC 624 at p 634; *Elder v Northcott* [1930] 2 Ch 422 at p 430; or whether it be a joint promise with the principal obligor by virtue of which an immediate obligation is assumed to the obligee which is joint with that of the principal obligor: *Permanent Trustee Co of NSW Ltd v Hinks* (1934) 34 SR (NSW) 130 (in which case, there is suretyship in equity though not at common law: *Wauthier v Wilson* (1912) 28 TLR 239); and whether the promise be a promise to be personally liable if the principal obligor does not perform the obligation, or a promise merely that certain property of the promisor shall be a security for the performance of the principal obligation: *Re Conley, Ex parte The Trustee v Barclays Bank Ltd* [1938] 2 All ER 127.

[10] We would like to state here by reference to the question posed in this appeal, it is apparent the plaintiff has already treated that the defendant as an entity was not a party to the agreement or arrangement entered into between the plaintiff and the borrower. If that is the case then the answer that follows would naturally be that the defendant cannot maintain an action against the plaintiff. It is true in this case that the High Court allowed the plaintiff's application to strike out the defendant's counterclaim based on the ground that the defendant was not a party to the loan agreement and hence the defendant has no locus standi to commence the counterclaim against the plaintiff. However on appeal, the Court of Appeal allowed the defendant's appeal and found as a fact that the loan agreement is in the nature of a contract of guarantee in which the defendant is a party. The defendant therefore has the locus standi to commence the counterclaim against the plaintiff. In this regard it is our considered view that the question posed has not been properly framed as it does not relate to a matter in respect of which a determination has been made by the Court of Appeal.

[11] We are of the view the Court of Appeal in the present case had come to a correct decision upon the application of a well established principle to the facts of the case. A further appeal to the Federal Court will be of no utility. This is because it will do nothing to clarify or refine the principle, so as to make it applicable to other situation in the future (see the case of *Datuk*

Syed Kechik bin Syed Mohamed & Anor v The Board of Turstees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257). We also find that learned counsel for the plaintiff is not able to show to us there are two conflicting decisions of the Court of Appeal over the point in issue in this case. The plaintiff has failed to satisfy the requirement of s 96(a) of the Act and we shall therefore decline to answer the question posed.

[12] For the reasons above stated we would dismiss this appeal by the plaintiff with costs. Deposit is to be paid to the defendant on account of taxed costs.

[13] We would like to express here our utmost concern over the protracted litigation of this case and the course of action taken by the parties. The trial of this case has yet to commence. The defendant's counterclaim in our view is not one and obvious case where summary jurisdiction under O 18 r 19 of the RHC 1980 could be invoked. In the circumstances of this case we would make an order that there be an early trial and priority given by the trial court to hear this case until its final conclusion.

[14] Our learned brother Augustine Paul FCJ before his untimely demise on 2 January 2010 had the benefit of reading this judgment in draft and had orally communicated to me that he agreed to it.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon